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No. 71-1178

IN THE

Supreme Court of the United States

October Term 1972

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION
CITY OF LAFAYETTE, LOUISIANA
CITY OF PLAQUEMINE, LOUISIANA
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT CITIES OF LAFAYETTE AND PLAQUEMINE, LOUISIANA

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-29a)[1] is reported at 454 F.2d 941. The orders of the Federal Power Commission here at issue are reported at 44 FPC 1524 (J.A. 181) and, on rehearing, at 45 FPC 139 (J.A. 200)[2].

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[1] "Pet. App.   " references are to the Appendix to the petition for certiorari filed by Gulf States Utilities Company in this proceeding. "J.A.   " references are to the oversize Appendix filed in this proceeding by leave of this Court.

[2] The supplemental order of the FPC issued December 9, 1970, and reported at 44 FPC 1555 (J.A. 186) is also technically before this Court.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on October 12, 1971. On October 22, 1971, Gulf States Utilities Company moved to extend the time within which to file a petition for rehearing to November 25, 1971. On November 5, 1971, an order was entered granting that motion. On November 24, 1971, a petition for rehearing was filed, which petition was denied *per curiam* on December 15, 1971 (Pet. App. 31a). A petition for a writ of certiorari was filed on March 13, 1972, and on May 30, 1972, this Court granted that petition.

The jurisdiction of this Court rests upon 28 USC 1254 (1) and Section 313(b) of the Federal Power Act, 16 USC 825 *l*(b).

STATUTE INVOLVED

Section 204 of the Federal Power Act, 16 USC 824c, is set out in the appendix, *infra.*, pages 49-51.

QUESTIONS PRESENTED

The Federal Power Commission must, under Section 204 of the Federal Power Act, authorize the issuance of a security proposed to be issued by a public utility before such issuance can take place. The Commission is empowered to issue such authorization only if it finds that the issue (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes. The questions here are:

1. Whether the FPC, in approving a proposed issuance by a utility of long term bonds without the hearing sought by protestants, may reject as irrelevant the claim by protestants, supported by substantial *prima facie* evidence, that the utility

had been utilizing available funds, and would utilize the funds made available by the financing, unlawfully to suppress competition.

2. Whether the FPC may decide to remand the issues raised by protestant Cities in a Section 204 proceeding to some other unspecified and amorphous proceeding, unconnected with the proceeds of the financing objected to, solely because it finds it inconvenient to follow the statutory procedures of Section 204 of the Act.

STATEMENT OF THE CASE

A. *Introduction*

This proceeding involves the denial by the Federal Power Commission ("FPC") of protests and demands for hearing and investigation directed to an application for authorization to proceed with certain financings. The protests were based upon the assertions that the proceeds of the financings would, if the financing were not conditioned, be utilized in connection with conduct involving an unlawful combination or conspiracy to suppress competition and unlawful attempts to monopolize by the destruction of the competitive position of the Cities and others. The FPC held these contentions "irrelevant" and approved the financings in question without the requested hearing, investigations or conditions.[3]

The Cities of Lafayette and Plaquemine,[4] Louisiana, the protestants before the FPC, will sometimes be referred to as "the Cities." The Cities own and operate relatively small municipal electric systems to serve their citizens. Petitioner, Gulf States Utilities Company ("Gulf States" or "Gulf") is charged with entering into a combination or conspiracy, hereafter described, with two other privately owned electric

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[3]The FPC, although technically a respondent here, continues to support the position of Gulf States, and has timely filed in support of petitioner.

[4]The City of Plaquemine, as distinguished from the better known Parish of Plaquemines, is located across the Mississippi from Baton Rouge, Louisiana.

utilities, Louisiana Power & Light Co. ("LP&L"), and Central Louisiana Electric Company ("CLECO"). These three utilities are collectively referred to, for simplicity, as "the Companies."

The factual background of the proceeding, as alleged in the Cities' protests, turns about an attempt by the Companies to suppress and defeat an interconnection and pooling agreement between the Cities, Louisiana Electric Cooperative, Inc. ("LEC") and the Dow Chemical Company[5] and an associated attempt by LEC to escape the control of the Companies. LEC, a generation and transmission cooperative financed by the Rural Electrification Administration, is made up of twelve electric distribution cooperatives, all of which operate in Louisiana.[6]

B. *The Factual Background*

The factual background was set out in the Cities' pleadings before the FPC.[7] The three Companies generate, transmit and sell electricity at wholesale and retail in Louisiana, while Gulf

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[5]Dow, whose plant is situated convenient to the Lafayette-Plaquemine area, owns and operates approximately 400,000 kw of generation which it utilizes in its plant operations. Some of these operations may be interrupted for short periods of time without serious loss; consequently Dow's generation capacity can be used by other pool members as emergency stabilizing capacity to the extent of some 150,000 kw.

[6]For ready reference all parties referred to in this brief are as follows:

"FPC" or "The Commission"–the Federal Power Commission
"SEC"–the Securities and Exchange Commission
"The Cities"–the Cities of Lafayette and Plaquemine, Louisiana
"Gulf States"–Gulf States Utilities Company
"LP&L"–Louisiana Power and Light Company
"CLECO"–Central Louisiana Electric Company
"The Companies"–LP&L, Gulf States and CLECO
"LEC"–Louisiana Electric Cooperative, Inc.
"Dow"–Dow Chemical Company

[7]Following the decision of the Court of Appeals below, the FPC granted a new Gulf States financing application then pending, over the protest and petition to intervene of the Cities, but accepted that protest

States also does this in Texas. The three Companies are interconnected and engage in sales and exchanges of electricity. They are members of the eleven "South Central Electric Companies" which engage in a seasonal exchange of energy with the Tennessee Valley Authority. They are joint owners of major 500 kv transmission facilities in Louisiana.

In September 1964, the REA undertook to make a $56.5 million loan to LEC for construction of a 200 mw[8] generating station with 1,611 miles of transmission lines through which LEC could serve eight of its twelve member cooperatives.[9] Prior to the grant of the loan, the three Companies, which had been selling power to these coops, had at the same time been duplicating cooperative lines, and building facilities to serve new loads which developed in territory previously served by the coops (J.A. 71-72).

The actual use of the appropriated money, however, was paralyzed for more than five years by a series of entirely unsuccessful (except in delaying the use of the moneys) law suits, by the Companies themselves, and by other putative plaintiffs through the Companies' attorneys (J.A. 72-75).

In August 1968, during the period of delay, the Cities, Dow and LEC executed an Interconnection and Pooling Agreement providing for the interconnection of their generating systems and a long term pooling and coordination arrangement, with a minimum term of ten years. That agreement was

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and petition to intervene as a complaint in a new proceeding, docket No. E-7676. The developments of that proceeding, over the vigorous delaying tactics of the Companies, until brought to a halt by the FPC following the grant of certiorari in this case are part of the common background assumed by all the parties hereto. A chronology of that proceeding is set out at Appendix B, hereto, pp. 52-61. Documents from that proceeding will be referred to, from time to time, in footnotes.

[8] A megawatt (mw) is a large unit of power equal to 1000 kilowatts (kw) or 1,000,000 watts.

[9] A cooperative association which serves its members with generation and transmission services is frequently referred to as a "G & T" coop.

approved by the REA Administrator on November 19, 1968. Under this agreement, the generation capacity of LEC would be pooled and future expansion coordinated with expansion of the existing facilities of the Cities and Dow, and LEC transmission facilities, designed to serve LEC's distribution cooperatives, would also be used to link the generating resources of the four pool members (J.A. 57-58).

Although Lafayette's present generating resources are interconnected with CLECO and Plaquemine's with LP&L, the pool agreement made available important economic benefits to the Cities. Under the pool there would be combined planning for the load requirements of the Cities, the LEC members and Dow. Thus there would be a market for all surplus capacity and secondary energy, and systems could size and time construction of new generators in the best interests of all the members of the pool, providing substantial capital savings and the advantages of the economies of scale. The pool would also provide for benefits in the form of back-up for each system and economy energy interchanges. The agreement contemplated that the pool could be expanded by the addition of the electric companies, if any wished to join (J.A. 57-58).

The Cities charged, and set out facts in support thereof, that the Companies had conspired to suppress competition by LEC and the Cities through the pool in order artificially to maintain their monopoly. Thus, the Cities alleged that the Companies had undertaken to prevent the LEC project and the related pool from going forward by blocking the disbursement of the loan funds through an extensive series of repetitive and unfounded law suits which the Companies had brought by agreement among themselves, both on their own behalf and through individuals ostensibly not associated with the Companies, questioning the propriety of the loan. In addition, the Cities alleged that the Companies had, during this period, conspired to mount a public relations drive designed to interfere with LEC's ability to operate, and to conduct an active lobbying effort in Congress and in the State legislature to cut off funds for LEC

and to create obstacles to its operation in Louisiana. The net effect of this combination and conspiracy, the Cities charged, was to hold up the loan money in litigation until January 1969, when a new REA Administrator was sworn into office (J.A. 72-75).

During the five years the Companies managed to hold up disbursement of the loan through their concerted efforts to utilize all the resources of the courts and administrative agencies so to do, the foreseeable inflation and load growth of the member systems of LEC had created a question as to whether the original loan would be adequate to finance all of LEC's needed generation and transmission (J.A. 75-76).[10] The new Administrator, based upon what are believed to be concerted and coercive demands made upon him by the Companies, while continuing to advance LEC the funds for the generating station, declined to advance funds for transmission capacity. This left LEC no alternative but to negotiate for transmission services with the Companies that had kept it in court for five years and had cost it some $250,000 in litigation expenses (J.A. 76).

In the negotiating sessions which followed, the Companies continued their combination and conspiracy by presenting a unanimous front to the coops and the other pool members.[11] Thus, while the LEC lines would have served the dual function of transmitting LEC power to its member coops and transmission of pool power among pool members, the Companies offered to supply transmission services only to some of the LEC members and refused to supply transmission services between pool members. Rather, the Companies demanded that LEC bind itself "to take all necessary steps to cancel, extinguish and terminate" the pool agreement. Not only did the Companies

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[10]The effect of inflation and load growth had apparently been foreseen by the Companies when they first combined to delay and obstruct the project.

[11]The Companies met in advance of each negotiating session to coordinate their own positions.

demand that LEC breach its obligations to the pool members, but they even insisted that LEC agree "to save and hold the Companies harmless from any claims of whatever nature arising out of or resulting from the aforesaid cancellation, extinction and termination of said Pooling and Interconnection Agreement" (J.A. 59, 148-149). Of course, if damages were assessed against the Companies and hence LEC under that clause, LEC would probably be destroyed, an objective apparently sought by the Companies.

Also, the Companies demanded that LEC limit the expansion of its generating plant to the 200 mw of capacity presently under construction, and that all power requirements of the 12 member coops, in excess of 200 mw, be supplied only by the Companies (J.A. 61, 126).

The object of the combination to destroy LEC and the pool was further demonstrated by the statement by a representative of Gulf States to one of the member coops, that Gulf States would not meet the power growth needs of its customer coops "until the G & T has been killed" (J.A. 60-61, 157).

The Cities set forth in their pleadings at some length the course of the negotiations to date, and the continued uniform position agreed upon by the Companies, together with the changes in that uniform position. Thus, all proposals to any of the pool members required the extinction of the long-term pool and coordination arrangement (J.A. 64). As the Cities noted, the collective activities by the Companies appeared to be a combination in restraint of trade to force a halt in LEC's development and the competition which would result therefrom, to expand or obtain monopolies in transmission and generation, to obtain captive markets which they would allocate among themselves on an exclusive basis, and to destroy the advantageous pool agreement of the Cities and Dow (J.A. 62).

C. *The Application*

On October 12, 1970, Gulf States filed an application with the FPC (J.A. 1 *et seq.*) requesting authorization for the

issuance of $30,000,000 in principal amount first mortgage bonds. As a jurisdictional utility not subject to the jurisdiction of the SEC under the Public Utility Holding Company Act of 1935, Gulf States is required to obtain the approval of the FPC under Section 204 of the Act for each security issuance. The application stated, *inter alia* (J.A. 5):

> J. *Purpose for which the securities are to be issued.*
> The proceeds from the sale of the New Bonds will be used by the Company to refund and pay off part of its commercial paper and short-term notes to banks to be outstanding as of the date of issuance. The Company estimates that on December 16, 1970, the date the securities are expected to be sold, there will be outstanding approximately $55,000,000 principal amount of commercial paper and short-term notes issued on various dates. The aforesaid commercial paper and short-term notes to banks constitute an issuance of securities previously authorized by the Commission (Docket No. E-7509).

The Cities, by petition of November 2, 1970 (J.A. 54, *et seq*) set forth at some length the assertions, outlined above, that Gulf States, in combination with LP&L and CLECO, had combined to suppress competition and injure the Cities in their competition. The Cities asserted that the combination which would be financed or refinanced by the bonds here proposed was an unlawful object, incompatible with the public interest, and neither necessary nor appropriate for, nor consistent with, the proper performance by Gulf States of service as a public utility. Consequently, the Cities opposed the grant of the requested authorization unless and until Gulf States purged itself of its violation of the antitrust laws and Section 10h of the Federal Power Act,[12] or unless the Commission conditioned its authorization upon the taking of such actions (J.A. 56-57). The Cities requested that the application be set

[12] See *infra*, pp. 19-20.

down for hearing unless Gulf States would agree to conditions establishing the original pool or its equivalent (J.A. 65).

On November 12, 1970, Gulf States filed its answer to the Cities' petition (J.A. 165 *et seq).*[13] Gulf States argued, *inter alia,* that the Cities' petition to intervene should be denied since the Cities had "no right or interest which could be affected in this proceeding, nor could Petitioners be aggrieved within the meaning of Section 313 of the Federal Power Act by any action of the Commission in this proceeding." (J.A. 167).

By Order of December 3, 1970 (J.A. 181 *et seq)* the Commission authorized the issuance of the bonds, granted intervention to the Cities, and denied the hearing sought. As here relevant the Order stated (J.A. 183):

> The requested approval of the issuance of the Bonds allow the Company only to change the form of a portion of its outstanding indebtedness, it does not call for the initiation of any construction or other program by the Company which might effect [sic] the interest of the Petitioners. The alleged violations which petitioners attempt to raise in this proceeding are irrelevant to a requested authorization of securities. There is no relief that the Commission can order in authorizing issuance of the Bonds for refinancing purposes that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them.[14]

In its formal findings, the Commission found, *inter alia,* that (J.A. 184):

> (4) The proposed issuance and sale of Bonds, as hereinafter authorized, will be for a lawful object,

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[13]This was the only one of the seven filings by Gulf subsequent to the Cities' intervention which Gulf saw fit to serve on the Cities.

[14]The Commission conceded after oral argument in the Court of Appeals that its action allowed Gulf States to increase its total indebtedness by $30,000,000. See page 14 infra.

within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance by Applicant or [sic] service as a public utility and which will not impair its ability to perform that service, and is reasonably necessary and appropriate for such purpose.

* * *

(6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission.

(7) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, do not raise any issue which requires a hearing.

By amendment filed December 9, 1970, Gulf States advised the Commission of the terms it proposed to accept in the financing (J.A. 186). By order (J.A. 186) issued that same day the Commission approved those terms and further found (J.A. 187):

(2) The proposed issuance and sale of Bonds hereinafter authorized, will be for a lawful object, within the corporate purposes of Applicant and compatible with the public interest, which is appropriate for and consistent with the proper performance of service by Applicant as a public utility and which will not impair its ability to perform that service, and is reasonably appropriate for such purposes.

On December 16, 1970, the Cities filed the petition for rehearing which is a statutory prerequisite to review under Section 313(a) of the Act (J.A. 188 *et seq*). In that petition the Cities noted that the Commission had necessarily accepted as

true for purposes of its orders all charges made by the Cities since it had failed to grant the statutorily required hearing (J.A. 188), and reasserted all grounds raised in their original petition (J.A. 189). The Cities also pointed out that the Commission could not have known for what purposes the monies authorized were used since the application in the short-term financing docket (E-7509) here changed to long-term had stated only that (J.A. 190):

> The proceeds from the Notes will be added to the *general funds* of the Company *to be used, among other things,* to provide part of the interim funds for construction expenditures. [emphasis supplied]

Consequently, the Cities urged, there could be no record support for the Commission's findings as to the object for which the bonds were issued, since the Commission could not have known what that object was, and Gulf States could, consistent with the representations made by the Cities, have utilized these monies for the furtherance of its combination in restraint of trade (J.A. 191-193).

The Cities also noted that it was unclear whether the Commission had intended to say that the issues raised were irrelevant because this was a refunding rather than a new funding (which the Cities believed to be factually in error) or were in general believed to be irrelevant to its functions under Section 204. At the very least, the Cities suggested, the Commission should have conditioned the funding authority so that it would not be used to the detriment of the Cities or in a manner inimical to the proposed pool, and started an investigation (J.A. 193).

By order of January 13, 1971, the Commission denied the Cities' petition for rehearing (J.A. 200). The Commission noted that the Cities had raised all the issues included in the original petition to intervene, and (J.A. 200):

> In addition, [the Cities] present the further argument that [Gulf States'] described use of the

> funds authorized in Docket No. 7567 and Docket No. E-7509, as set forth in the applications, are not sufficient to support the Commission's findings that the issuance of Bonds is for a "lawful object . . . compatible with the proper performance by (Gulf States of) service as a public utility . . ."

Rather than deal with this "further argument", however, the Commission merely went on to find that (J.A. 201):

> The grounds for rehearing set forth [by the Cities' present no facts or legal principles which would warrant any change in or modification of the aforementioned Commission orders . . .

and denied rehearing without mentioning the Cities' request for an investigation and for conditions in the order.

D. *The Court of Appeals' Decision*

In the Court of Appeals, this proceeding was combined for argument and decision with a similar case in which the Cities protested the approval by the Securities and Exchange Commission of a financing application by LP&L under Sections 6 and 7 of the Public Utility Holding Company Act of 1935, 15 USC 79f, g.[15] That Court reversed the decision of the FPC but upheld that of the SEC.

The Court held, as here relevant, that, as a general rule it might be observed that a host of decisions of this and other Courts have determined that the public interest is presumed to be disadvantaged when private enterprises are permitted to engage in anti-competitive agreements and restraints, although

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[15]The SEC action had been initiated, on the part of the Cities, by an October 9, 1970, letter-petition by the Cities to the SEC (J.A. p. 15 *et seq* in No. 24764 below). In that letter, in addition to spelling out the actions by which the Companies were attempting to destroy the Cities and the LEC pool, the Cities had requested, *inter alia*, a conference with the FPC and SEC staffs. Although this letter was also sent to the FPC, no response whatever was made by the FPC, and the only response by the SEC was its approval of the financing which the Cities opposed.

that presumption might be subject to rebuttal on analysis by the cognizant agency. The Court observed that the primary interpretation of Section 204 by the FPC had been in *Pacific Power & Light Co.*, 27 FPC 623 (1962). Without reviewing that decision or Commissioner Morgan's "vigorous dissent" at 27 FPC 631 and 1388, the Court below noted that the FPC majority there held, relying on the fact that Section 204 was copied almost verbatim from Section 20a of the Interstate Commerce Act, that the purpose of Section 204 was to prevent the issuance of securities which might impair a utility's financial integrity or its ability to perform its public utility responsibility. Since that interpretation by the ICC of Section 20a was thereafter reversed by this Court in *Denver & Rio Grande Western R.R. v. United States*, 387 US 485 (1967), the Court reviewed the position taken by the FPC in this case in the light of the *Denver & Rio Grande* opinion and found that position wanting.

The Court also held that the contention made by the FPC, that the Cities could not be injured by its approval because the application for financing approval sought only to replace short-term notes with long-term bonds, was lacking in substance since the approval freed an additional $30,000,000 in short-term note authorization, thus allowing Gulf States to increase its total debt. The FPC had failed to answer this point when repeatedly raised by the Cities, was unable to answer it at oral argument below, but had conceded that it was the case in a supplemental memorandum filed with the Court after the oral argument.

The Court also quickly disposed of the argument made by Gulf States below, that the Cities were not "aggrieved" and thus had no standing to seek review, under well-settled law.

SUMMARY OF ARGUMENT

This case, and the *Otter Tail* case this term[16] present to this Court the question of the inter-relationship of the antitrust

[16] *Otter Tail Power Company v. United States*, No. 71-991, presently pending.

laws and the Federal Power Act.[17] The basic issue here is whether the FPC may evade its statutory responsibility to determine, on the record, that an issue of securities is "for some lawful object . . . compatible with the public interest" by allowing, over the vigorous protest of Cities, a financing to take place without more than an extremely perfunctory shuffling of papers.

I

Many of the arguments in this case and in the *Otter Tail* case depend upon the assertion that the antitrust laws and the principles thereof were not intended to apply to the electric power industry. We shall show, not only that the antitrust laws have *not* been somehow "superseded" by the Federal Power Act, but that Congress has been sufficiently concerned with the anti-competitive practices of the electric power industry to take further steps to de-centralize that industry and, from time to time, intentionally to provide additional forums and remedies for those concerned, to attempt to force the giants of that industry to deal more fairly with the smaller publicly owned and small privately owned segments of the industry. The decision of this Court in *California v. FPC*, 369 US 482 (1962) demonstrates the applicability of the antitrust laws to the natural gas pipeline industry, and, necessarily, to the electric power industry as well. Decisions both by this Court and by the Federal Power Commission establish the reality of competition, on a wholesale or bulk power supply basis, in the electric power industry.

II

Section 204 of the Federal Power Act provides that the FPC may approve a financing for a public utility only after it

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[17]These cases also raise the issue of primary jurisdiction, a subject aptly described by a respected commentator as "enveloped in obscurity". *Kestenbaum, Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 Geo L. J. 812, 813 (1966-67).

makes certain explicit findings as to the use of the proceeds of that financing. We shall demonstrate that Congress, in accordance with the legislative history and the statute, required the FPC to examine and approve the purpose for which the proceeds of a financing were to be spent before approving the application for that financing, and that the FPC's earlier decision that it could ignore the purposes for which the proceeds of the financing were to be expended rested upon premises which were not then and are not now accurate or appropriate. The decision of this Court in *Denver & Rio Grande Western R.R. v. United States*, 387 US 485 (1967) made clear that the premises on which the earlier FPC opinion was drafted are not accurate.

III

If, as is the case, the FPC must examine the purposes for which the proceeds of a financing will be used, and find that those purposes are consistent with the public interest, it may not approve a financing, without more, where it appears that the purpose for which the proceeds will be used is inconsistent with the antitrust laws of the United States. Such a financing can be approved only upon suitable conditions, so that the Commission can rationally conclude that the public interest is satisfied.

IV

Both the FPC and Gulf States suggest that the Commission can equally well treat the Cities' complaints of anticompetitive action by the Companies in some other kind of proceeding or that the Cities should find a remedy in a direct treble damage suit. We shall demonstrate that this Section 204 proceeding is the only kind of forum which offers rapid and effective relief at the FPC and that the other forms of relief suggested are likely to be ephemeral or so drawn out as to be virtually bootless. Consequently there is no basis for the attempt by the FPC to avoid the procedure established by Congress in Section 204 merely because that procedure is one which the FPC and Gulf States find inconvenient.

ARGUMENT

I

THE RELATION OF THE ANTITRUST LAWS TO THE FEDERAL POWER ACT

One of the basic fallacies in the arguments being made by the electric companies here is the contention directly made by *amicus* Public Service of Indiana and indirectly by Gulf States that the antitrust laws of the United States do not apply to the actions of electric companies subject to the jurisdiction of the FPC and thus that neither the FPC nor any other agency or Court need concern itself with the sort of conduct found here.[18] This contention, in addition to being in direct conflict with the teachings of this Court in *California v. FPC*, 369 US 482 (1962) and other cases, is also in direct conflict with the legislative history of the Federal Power Act, the holdings of the FPC, and the realities of the electric power industry in the United States. As we shall show, not only has the reality of competition in the electric industry on many levels always been recognized, but Congress has, from time to time, been forced to take steps to subject the industry to regulatory supervision beyond and in addition to the Sherman and Clayton Acts to attempt to ensure the maintenance of fair competitive practices.

A. *The Electric Power Industry and Competition*

The suggestion which is made by petitioners and *amicus*, Public Service of Indiana, that there is no competition in the electric industry, is startling, to say the least. The electric power industry in America is a multifarious one.[19] The greatest economic power and visibility is clearly in the two hundred largest privately-owned utilities which own and operate more than 75% of the generating capacity, and serve about 80% of the customers of the industry (1970 NPS, page I-2-4).[20] There

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[18]This position is also taken by some of the parties and *amici* in *Otter Tail*.

[19]See, in general, *1970 National Power Survey*, FPC (1971), Chapter Two. This document will be referred to as "1970 NPS".

[20]See Footnote 19, supra.

are, however, also about 200 small privately-owned systems, about 2,000 municipal systems and close to 1,000 REA cooperative systems which are also part of the industry (1970 NPS, pp. I-2-1 to I-2-8). Ordinarily, because of the heavy and duplicative capital outlay which would be involved, there is little, if any, competition for existing retail loads.[21] There is, of course, a great deal of competition between systems in seeking to attract new loads.[22] There is also competition for sales at wholesale, a matter as to which no statute has ever heretofore been thought to eliminate competition.[23]

B. *Competition as Seen by Congress in the Electric Industry*

The sort of competition involved in the electric industry has regularly been recognized by Congress, and was recognized in the passage of Part II of the Federal Power Act. Parts II and III of the Federal Power Act were passed as Title II of the Public Utility Act of 1935 (Title I of which was the Public Utility Holding Company Act of 1935). 49 Stat. 803. The Public Utility Act was passed consequent to the receipt by the Congress of a multi-volume study of the utility industry which had been completed, on reference, by the Federal Trade Commission. S. Doc. 92, 70th Cong., 1st Sess. In describing the electric industry, that Commission observed, *id*, Part 73-A, page 52:

> While ordinarily there is not actual competition between operating units under diverse ownership there is frequently potential competition in that a

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[21]One of the problems in Louisiana, however, was the duplication by petitioners and their co-conspirators of REA coop distribution lines to seek to take away existing customers of the coops, which were forced to purchase all their power from the companies and thus limited in their ability to compete.

[22]See, in general, *1964 National Power Survey*, FPC, Part II, pp. 365-367. This document will be referred to as "1964 NPS".

[23]See, in general, 1964 NPS part II, pp. 365-370.

> given operating system may readily extend its lines and service to municipalities . . . which are on the edge of the territory occupied and served by a rival system . . . . Moreover, there are hundreds of cases where municipalities own and operate their distribution lines and purchase at wholesale from private generating plants. Frequently there is no physical or engineering obstacle, but only one of policy to their making these purchases from more than one operating system. If these operating systems are independent of each other, the purchasing municipality is obviously in a better bargaining position than if they are controlled by the same holding company. . . . Decisions of the Supreme Court recognize the protection of potential competition as coming within the proper regulation of interstate commerce.

In general the FTC concluded that, because of the then existing judicial interpretation of the Sherman Act and the weakness of the then existing Clayton Act, these Acts were insufficient to deal with the problems caused by holding companies which eliminated competition among the operating utilities which they controlled, notwithstanding the existence in the industry of substantial and important intra-modal competition which ought to be preserved. *Id.* pp. 47-56.[24]

Out of the FTC recommendations came the Public Utility Act of 1935. Although that Act amended many of the sections of the Federal Water Power Act, which became Part I of the Federal Power Act, Congress did not amend or repeal Section 10h, 16 U.S.C. 803 (h), applicable to licensees such as Gulf States, which provides:

> That combinations, agreements, arrangements, or understandings, express or implied, to limit the output of electrical energy, to restrain trade, or to

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[24]The FTC also set out several instances of the methods by which utility systems had overreached in take-over attempts of publicly owned plants, the details of which sound remarkably up to date. Senate Doc. 92, Part 72-A (70th Cong., First Sess.) pp. 230-235.

> fix, maintain, or increase prices for electrical energy or service are hereby prohibited.

Rather, Section 10h was among those Sections which were expressly incorporated as Part I of the Federal Power Act. See Section 212 of S 2796, 74th Cong. 1st Sess. (1935).

The competitive status of public and private electric systems was regularly recognized in the debates on passage of that bill. In support of that bill, Senator Bone, one of the bill's leading proponents, stated, 79 Cong. Rec. 8683 (1935), recognizing the competition in the industry:

> The propaganda machine of the power combine can spend money without regard to amount. Like another Caesar Augustus, it need only send forth the edict that the whole Nation be taxed, and it is done – taxed to supply the sinews of war to battle any sort of legislation or regulation, or to eliminate competition from public plants.

Congressman Eicher, a principal proponent of the bill in the House, also recognized the competitive situation when he explained the several bases for the dissolution of the holding companies on the floor of the House at 79 Cong. Rec. 10361 (1935):

> A third basis for Federal regulation and dissolution of utility holding companies is the familiar power of Congress to prevent monopolies or restraints of trade in interstate commerce. This power is not diminished by the fact that in each local community the operating company normally has a monopoly upon the distribution of electricity. The restraints of trade with which the Federal Government is concerned are those which come from the control by holding companies of the operating companies; such control prevents any competition in the purchase of electricity .... To the extent that the great holding companies control the facilities for the interstate distribution of electricity they prevent competition in

the interstate transmission of electricity just as did the holding company in *Northern Securities Co. v. United States* (193 U.S. 197) prevent competition between railroads engaged in interstate commerce. The case just cited made plain the power of Congress to prohibit intrastate corporate devices which serve to restrain interstate competition. It appears clear that the power of Congress to dissolve the holding companies has the same constitutional foundation as the antitrust laws.

There is no legislative history which would indicate that Congress intended to immunize electric companies from the antitrust laws; rather, history is clear that Congress intended to go beyond the antitrust laws as they then stood and, in Title I, to break up the holding companies whether or not they had violated these antitrust laws. As Senator King, one of the leading opponents of the bill, urged in trying to halt its passage, 79 Cong. Rec. 8929 (1935):

> . . . *We need not a line of legislation, therefore, to show that the antitrust laws will apply to public utility companies as well as to any other companies; and under the procedure in many cases such illegal organizations might be dealt with in a satisfactory manner under the processes of the Courts.* Under the terms of the bill the holding companies are to be destroyed whether they promote commerce or restrain it; whether they are combinations or single individual entities; whether they increase competition or secure monopoly. Nothing is even said on the subject; and if it were, as I have indicated, the laws already on the statute books are ample to deal with the situation, and if such laws are not enforced that is no reason for the enactment of this proposed bill. We are indeed in an unfortunate position if Congress must at every session reenact every law that is not being enforced. [emphasis added]

Senator Wheeler, in support of the bill, stated its purpose, 79 Cong. Rec. 8400 (1935):

> . . . To limit the concentration of power of economic enterprise in the public interest so that it will not menace the safety of the Nation. If government has not the power to curb the economic fascism and the private socialism of holding company domination, the Federal Government would be without power to prevent the very dangers to democracy which the Supreme Court feared lurked in the National Recovery Act.

It thus appears quite clear that there was no attempt to exclude the electric power industry from the scope and reach of the antitrust laws in the passage of the Public Utility Act of 1935. Quite to the contrary, although many other regulatory statutes contain language which protect the regulated industry from antitrust consequences of actions which are approved by the agency,[25] there is no such protection or exemption given in the Federal Power Act.

Nor has there been any change in the structure of the electric industry in recent years which would lend weight to the contentions of those who suppose the antitrust laws somehow "superseded" by some amorphous intent of Congress in the passage of the Federal Power Act. Indeed, the history of the Atomic Energy Act plainly shows the contrary result.

The Atomic Energy Act of 1946, in Section 7(c), 60 Stat. 755, 764-765, expressly required the AEC to condition, after consultation with the Attorney General, the licenses it was authorized to issue, if "activities under any license might serve to maintain or foster the growth of monopoly, restraint of

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[25] e.g., Shipping Act, Section 15, 46 U.S.C. 814; Interstate Commerce Act, Section 5 (11), 49 U.S.C. 5 (11), Section 5A (9), 49 U.S.C. 5b (9); Federal Aviation Act, Section 414, 49 U.S.C. 1384.

trade, unlawful competition . . .", "to prevent these results . . . ." There can be little doubt that these concerns of Congress expressed in Section 7(c) were applicable, *inter alia,* to the electric power industry. If there were any such doubt, however, it would be dispelled by subsequent history. The Atomic Energy Act of 1954, in Section 105, provided, for licenses which had "practical value", that the AEC consult with the Attorney General as to whether the proposed license to an electric utility would tend to create or maintain a situation inconsistent with the antitrust laws. Even by 1954, of course, it was apparent that licenses for power reactors would be issued primarily to existing electric companies.

When the Atomic Energy Act was amended in 1970, to revise the procedure for antitrust review when it appeared that the AEC would be forced to find that the multi-million dollar investments of the electric industry in nuclear generation had practical value, the AEC was again directed to make findings as to whether the activities under the license to be issued would create or maintain a situation inconsistent with the antitrust laws. 42 U.S.C.A. 2135 (c) (pocket-part). Since the 1970 amendments were in response to the decision of the Court of Appeals for the District of Columbia Circuit in *Cities of Statesville, et al. v. AEC,* 441 F 2d 962 (D.C. Cir. 1969), which specifically identified the large electric companies as those charged with practices inconsistent with the antitrust laws, there can be no question as to the portion of the industry whose practices Congress anticipated would be reviewed.

At all times, of course, the Atomic Energy Act has retained its proviso that expressly retains the applicability of the antitrust laws to the electric industry. Section 105 (a), 42 U.S.C. 2135 (a). As the Joint Committee report stated, S. Rep. No. 91-1247 (91st Cong., 2nd Sess., 1970), page 13; H.R. Rep. No. 91-1470 (91st Cong., 2nd Sess., 1970), page 13, "Subsection 105a wisely emphasizes that 'Nothing contained in this Act' – and this includes subsection 105 c – 'shall relieve any person from the operation' of the antitrust laws". As Congressman Price put it, 116 Cong. Rec. 34318-34319 (1970):

> Paragraph (5) does not preclude in any manner the right of the Department of Justice to pursue antitrust suits, civil or ciminal in nature, in the courts, whether or not there are involved parties, facts, or issues that were, or are being, considered by the Commission and nothing in the bill would preclude or limit the intervention or participation of the Department of Justice in proceedings before other regulatory agencies where antitrust issues are involved, and irrespective of whether they involve parties, facts, or issues pertinent to Commission proceeding.

See also statement of Congressman Holifield, 116 Cong. Rec. 34309 (1970); statements of Senators Pastore, 116 Cong. Rec. 39619 (1970); Aiken, 116 Cong. Rec. 39620 (1970); Metcalf, 116 Cong. Rec. 39621 (1970); and Hart, 116 Cong. Rec. 39621-39622 (1970).[26]

Thus it appears, quite plainly, not only that it has been clear to Congress that the antitrust laws have not been somehow magically "superseded" by the Federal Power Act, but that Congress has been sufficiently concerned with the behavior of the electric power industry to take further steps to de-centralize that industry and, from time to time, outside the antitrust laws directly, but consonant with the thrust and force thereof, to force the giants of that industry to deal more fairly with the smaller publicly-owned and small privately-owned portions of the industry.

C. *Competition in the Electric Industry As Seen By The FPC and the Courts*

The FPC, if there were any question, has made it clear that a small system is not bound to a single wholesale supplier of

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[26] There is no question that Congress understood that there might be enforcement of the antitrust laws directly in the electric industry as well as requiring the AEC to deal with these issues in licensing matters and other agencies to deal with them as appropriate. For these intentions of the Department of Justice were clearly set out and, indeed, relied upon by Congress. See, *e.g.*, in addition, Statement of Senator Kennedy, 116 Cong. Rec. 39948 (1970).

power, but may change its supplier as it deems best. *Alabama Electric Cooperative v. Alabama Power Co.*, 38 FPC 962 (1967); *Shrewsbury Municipal Light Department v. New England Power Co.*, 32 FPC 373 (1964), *affirmed; New England Power Co. v. FPC*, 349 F 2d 258 (1st Cir., 1965).[27] And this Court, too, in a series of cases shortly after the passage of the Public Utility Act of 1935, emphasized that, so far as service to a particular municipality was concerned, no electric company possesses ". . . a right to be immune from lawful municipal competition." *Alabama Power Company v. Ickes*, 302 U.S. 464, 480 (1938). Cf. *Tennessee Electric Power Co. v. TVA*, 306 U.S. 118, 138-140 (1939). None of these cases, of course, is consistent with the theory that competition has been abandoned in the electric industry above the retail level.

D. *The Decisions of This Court Under the Natural Gas Act*

This Court, in a case almost directly in point under the other major act administered by the FPC, the Natural Gas Act, has determined that the antitrust laws do in fact apply to the natural gas pipeline industry, and that, indeed, if a conflict of

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[27] See also the recognition by the FPC that it is bound to consider the effects of its actions on the competitive structure of the electric utility industry in *Commonwealth Edison Co.*, 36 FPC 927, 940-1 (1966), *affirmed sub nom Utility Users League v. FPC*, 394 F.2d 16 (7th Cir., 1968) *cert. denied* 393 US 953 (1968). The competition in the electric industry is not unique. In the cases decided under the Natural Gas Act, where the FPC has, in addition, control of market entry and exit, the Commission has determined that competition is frequently desirable. See, *e.g.*, *Columbia Gulf Transmission Co.*, 37 FPC 118 (1967), *affirmed sub nom Atlantic Seaboard Corp. v. FPC*, 397 F.2d 753 (4th Cir., 1968); *City of Hamilton, Ohio*, 37 FPC 209 (1967), *affirmed sub nom Cincinnati Gas & Electric Co. v. FPC*, 389 F.2d 272 (6th Cir., 1968) *cert. denied*, 393 U.S. 826 (1968); *Alabama-Tennessee Natural Gas Co.*, 38 FPC 1069 (1967), *affirmed sub nom Alabama-Tennessee Natural Gas Co. v. FPC*, 417 F.2d 511 (5th Cir. 1969); *Algonquin Gas Transmission Co.*, 37 FPC 1128 (1967).

jurisdiction to decide a particular question does arise between the Commission and a district court hearing an antitrust suit, the district court has primary jurisdiction as to that matter. *California v. FPC,* 369 U.S. 482 (1962). See also *United States v. El Paso Natural Gas Co.,* 376 U.S. 651 (1964). In this respect, the contention being made in this proceeding and the *Otter Tail* proceeding, that the "comprehensive nature" of the regulation of electric companies under Part II of the Federal Power Act by the FPC excludes the applicability of the antitrust laws, is a very strange one. As is immediately apparent from examination of the regulatory schemes by which electric companies and natural gas pipelines are controlled by the FPC, the regulation of electric companies is substantially less rigorous than the regulatory scheme applicable to natural gas pipelines under the Natural Gas Act. The scheme of Part II of the Federal Power Act, based primarily upon the retail-wholesale distinction which leaves most electric companies subject to state regulation for their retail electric business, provides for direct regulation of certain specific functions of electric companies by the FPC, direct regulation of other functions by State public utility commissions, and, in other instances, no regulation at all for some functions other than by the enforcement of rights before various courts. As to those matters where it is given jurisdiction, of course, the FPC ordinarily is given broad statutory power to regulate effectively.

Thus, for example, the FPC, under Part II of the Act, is given no authority to regulate market entry, limited authority to control market exit, no cease and desist power, no authority to approve agreements allocating markets, and no direct certification authority over facilities. In the Natural Gas Act, on the other hand, the FPC has authority to certificate pipeline construction, to regulate market entry, to control all sales, and complete power over abandonment of service and thus over allocation of markets. In neither the Natural Gas Act nor the Federal Power Act does the FPC have express authority to immunize transactions from the antitrust laws.

As this Court made clear in *California v. FPC, supra,* the competitive situation in the natural gas industry (and, perforce, the electric power industry) is such as to require the application of the antitrust laws both by regulatory agencies and by the district courts in antitrust suits. As the Court stated, *id.* at 485, "... while 'antitrust considerations' are relevant to the issue of 'public interest, convenience and necessity' ..., there is no 'pervasive regulatory scheme' ... including the antitrust laws that has been entrusted to the Commission." Thus, as this Court there held, the antitrust laws apply, both directly, and through the functioning of the regulatory agencies. As we have demonstrated, this salutary result is consistent with the realities of the industry and the repeatedly expressed intent of Congress as well as the statutory scheme.

II

THE FPC IS REQUIRED TO APPROVE THE PURPOSE FOR WHICH THE PROCEEDS OF A FINANCING WILL BE SPENT

The Federal Power Act provides, in Section 204, that no electric public utility subject to the FPC's jurisdiction may issue any security "unless and until, and then only to the extent that, upon application by the public utility, the Commission by order authorizes such issue or assumption of liability",[28] unless the electric utility is a public utility holding company or a subsidiary thereof[29] or its security issues are regulated by a State Commission in the state of its organization and operation.[30] There is here no doubt that Gulf States may not issue any security unless authorized by the FPC under this Section.

The standards to be utilized by the FPC are those set out by the Act, Section 204(a):

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[28] Section 204(a), 16 USC 824c(a)

[29] Section 318, 16 USC 825q

[30] Section 204f; 16 USC 824c (f)

> The Commission shall make such order only if it finds that such issue or assumption (a) is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility and which will not impair its ability to perform that service, and (b) is reasonably necessary or appropriate for such purposes.

Thus the Act expressly requires the Commission to make findings that the issue is, *inter alia,* 1) "for some lawful object", which is 2) "compatible with the public interest", 3) "which is necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility" and 4) "which will not impair its ability to perform that service", and 5) that the issue is "reasonably necessary or appropriate for such purposes."

If there were any question as to the requirement of the Act that the Commission concern itself with the purposes for which the proceeds of an issue of securities are to be spent, that question would be resolved by Section 204(b):

> The Commission, after opportunity for hearing, may grant any application under this section in whole or in part, and with such modifications and upon such terms and conditions as it may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make supplemental orders in the premises as it may find necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order *as to the particular purposes, uses,* and extent *to which, or the conditions under which,* any security so theretofore authorized or *the proceeds thereof may be applied,* subject always to the requirements of subsection (a) of this section [emphasis supplied].

If this were not enough to demonstrate the intent of the Congress to charge the Commission with oversight of how funds resulting from the issuance of authorized securities are utilized, Section 204(c) provides:

> No public utility shall, without the consent of the Commission, apply any security or *any proceeds thereof to any purpose not specified in the Commission's order,* or supplemental order, *or to any purpose in excess of the amount allowed for such purpose in such order,* or otherwise in contravention of such order [emphasis supplied].

Thus it is apparent that Congress sought to charge the FPC with oversight of the use by the utility of the proceeds of financings, and that the language of the Act itself so requires.[31]

The requirement of Section 204 that the FPC address itself to and approve the purpose for which the money authorized is to be spent is, of course, consistent with the legislative history of the Act. As we have shown, the Public Utility Act emerged, in substantial part, from the reports of the FTC to the

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[31]The FPC appears to restrict itself to the argument that Section 204 does not require it to consider the use of the proceeds of the financing. Gulf States, on the other hand, argues (brief, pp. 30 *et seq*) that even if the FPC is required to investigate anticompetitive actions in a Section 204 proceeding, its failure here so to do was a finding of fact which could not be set aside on appeal. This argument is based on the confusion of the FPC as to what it was doing, and its apparent assumption that the only effect of its order was to refinance certain securities. As we have noted, the Commission abandoned this point when, *after the oral argument below*, its then General Counsel discovered, and admitted to the Court, that the Cities had been correct when they asserted that the effect of the FPC order had been to authorize Gulf States to obtain some $30,000,000 more than it would have been able to obtain without the order.

Congress,[32] and the report of the National Power Policy Committee,[33] H. Doc. No. 137, 74th Cong., 1st Sess. (1935), reprinted in S. Rep. No. 621, 74th Cong., 1st Sess. (1935), pp. 55 *et. seq.* The National Power Policy Committee had recommended that, S. Rep. No. 621, *supra,* at 59, "Security issues should be limited to purposes necessary in the public interest, which accords with the ultimate purposes of the legislation . . .". And the FTC Summary Report, S. Doc. No. 92, part 73-A, 70th Cong., 1st Sess., at page 215, had suggested "the possibility of extending the jurisdiction of the Securities and Exchange Commission to the point of preventing the capitalization for holding companies in connection with promotion and any operations which are in fact illegal and incident to which capital funds are sought." Thus it is apparent that the progenitors of the Act had in mind precisely what the language of the Act requires.

Section 204(b) expressly provides that the Commission "after opportunity for hearing," may grant any application in whole or in part upon such terms and conditions as it may find necessary and appropriate. The FPC Regulations applicable to Section 204 applications, Regulations under the Federal Power Act, Part 34, at Section 34.9, 18 CFR. 34.9, expressly provide that a hearing may be necessary.[34] And the Administrative Procedure Act requires that Act's hearing procedure set out at 5 U.S.C. 556, 557 be applied whether a Section 204 decision is considered as a rule-making (see 5 U.S.C. 553 (c)) or an adjudication (5 U.S.C. 554) since Section 204 requires Commission findings "after opportunity for a hearing." These procedures would be meaningless under the decision of the F.P.C.

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[32]Section 1, 15 U.S.C. 79a (b).

[33]The Act emerged in two titles of course, with functions split between the SEC and the FPC to prevent overlap and duplication.

[34]Gulf States' contention that (brief, pp. 34-35) the Act requires only an opportunity for the applicant to be heard and not for any

It is conceivable that an ingenious Commission which wished to avoid regulatory problems by narrowing its own jurisdiction might interpret the language of Section 204(a) if it stood alone, as merely requiring the Commission "to prevent the issuance of securities which might impair the company's financial integrity or its ability to perform its public utility responsibilities." But if the FPC had not so held, in *Pacific Power & Light Company*, 27 FPC 623, 626 (1962), over the strong dissents of Commissioner Morgan, 27 FPC 631, 1388, it would be hard to credit that reading to a responsible agency.[35] For this view requires that the agency blind itself to the purposes for which the proceeds of the security issues would be used, and this would render wholly nugatory the succeeding subsections of the Act, as well as the requirement of Section 204(a) that the object of the financing be "necessary or appropriate for or consistent with the proper performance by the applicant of service as a public utility".[36]

The FPC does not seriously attempt to rationalize or support its earlier decision in *Pacific Power & Light Company, supra,* except by reference to the rule that deference is given to an initial interpretation of the statute by the agency charged with its administration (Brief, page 21-22). Although it is

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protestant to be heard is totally without merit. 5 USC 553(b), 554(b); 18 CFR 1.19. Indeed the FPC Regulations under Section 204 expressly require an applicant to submit "a form of notice suitable for publication in the Federal Register, which will briefly summarize the facts contained in the application in such way as to acquaint the public with its scope and purpose." 18 CFR 34.2 (q).

[35]Of course, at p. 628 the Commission there recognized that "the Commission must satisfy itself, of course, that the object is lawful and within the corporate purposes." Neither this recognition, nor the recognition of comparable duties in *Black Hills Power & Light Co.*, 31 FPC 1605 (1964), however, seem to have affected the Commission's propensity to ignore the object for which funds are to be spent.

[36]Thus the view which the Commission espoused would only ensure that a utility was *able* to perform its duties as a public utility, without attempting to ensure that the purposes of the financing were consistent with those duties.

difficult to demonstrate the error of the *Pacific Power & Light* decision more convincingly than did Commissioner Morgan at the time, in his dissent, the error may readily be shown. The efforts of Petitioners and the FPC to perpetuate a reign of error must fail, for, as this Court has observed, "even consistent error is still error" and should be corrected, once discovered. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678, Note 5 (1954).

In *Pacific Power & Light Co.*, the FPC determined, over strong dissent, that it need not look into the purpose for which the proceeds of the financing were to be spent. In so doing, it relied upon three distinct premises,[7] each of which is demonstrably in error or fails to lead to a conclusion consonant with that of the Commission:

> 1. The Commission appeared to rely most heavily on the fact that "the criteria for approval of security issues in Section 204(a) are copied almost verbatim from Section 20a of the Interstate Commerce Act . . ." *id* at 627. The Commission analyzed the history of that Act and concluded that it, and therefore Section 204a of the Federal Power Act as well, were designed solely for the protection of the utility and its shareholders.
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> 2. The Commission also relied upon the fact that Congress had not, in the passage of Part II of the Act, given the FPC certificate jurisdiction over the construction of all facilities. *Id.* at 626.
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> 3. The Commission relied upon the fact that the FPC regulates, under Section 204, only the financings of those companies not subject to state financing regulation or that of the SEC under the Holding Company Act. *Id*, at 626.

As a result of its analysis of these premises, the Commission majority concluded, *id* at 628, that its duty under Section 204 required that the Commission "must satisfy itself, of course, that the object is lawful and within the corporate purposes.

Beyond that, we must inquire whether the contemplated investment would impair the company's ability to perform its normal functions as a public utility. The Commission might look to whether the investment is so improvident, frivolous, or speculative, that it threatens to squander the corporate substance without reasonable hope of return."

Beyond the fact that the Commission majority in *Pacific Power & Light* did not attempt to rationalize the result there reached with the language of the statute itself (an attempt which appears to be impossible of success and which neither petitioners nor the FPC even purport to accomplish in their briefs before this Court), the premises upon which the Commission proceeded in that case do not support the result reached in this. First, the reliance by the Commission upon the similarity in language between Section 204(a) and Section 20a of the Interstate Commerce Act is singularly inappropriate for the Commission's position here.

Of course, as Commissioner Morgan pointed out, *Id.* at 1394-1395, the Commission misquoted the commentator upon which it relied as to the ICC's lack of power in the analogous case there. But there is no question that the FPC's functions under Section 204 were modeled after those of the ICC under Section 20a of that Act, 49 U.S.C. 20a, S. Rep. No. 621, 74th Cong. 1st Sess. (1935), pp. 20, 50.

In these circumstances, the Cities believe that the decision of this Court in *Denver & Rio Grande Western R.R. v. United States,* 387 U.S. 485 (1967), interpreting the similar language of Section 20 of the Interstate Commerce Act, 49 U.S.C. 20, after which Section 204 was modeled, is dispositive here. As this Court held, at p. 492:

> We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation [footnote omitted]. Even if Congress' primary concern was to prevent such manipulation, the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close

> its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of . . . anticompetitive consequences when suggested by the circumstances surrounding a particular transaction.

Thus, the Court held, at 498:

> We conclude, therefore, that the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object", to consider the control and anticompetitive consequences before approving stock issuances under § 20a(2).

The FPC attempts, at Page 18 of its brief, to distinguish *Denver & Rio Grande* on grounds which, if more closely examined, surely would not have been raised. Thus the Commission suggests that the ICC's "history of weighing anticompetitive consequences in other proceedings under Section 20a of the Interstate Commerce Act" should be contrasted to actions of the FPC under the Federal Power Act. An examination of the ICC's history relied upon by this Court in *Denver & Rio Grande, supra,* at 494-495, however, reveals that the actions in which anticompetitive factors were taken into account were almost precisely the kind of actions in which the FPC historically has taken such factors into account. These actions included the requirement of competitive bidding when securities are issued (see 18 CFR 34.1a) and the supervision of interlocking directorates (see 18 CFR 45; *John Edward Aldred,* 2 FPC 247, 260-261 (1940)).

The FPC also attempts to argue that because the FPC would have had jurisdiction elsewhere in the Federal Power Act to consider the anticompetitive consequences which this Court found in *Denver & Rio Grande,* if the transaction there had

been subject to its jurisdiction, this Court would not have reached the decision it did in that case if under Section 204 rather than the Interstate Commerce Act. This strained bit of logic should avail the FPC nought: there is no question what Section 20a means under *Denver & Rio Grande*; nor is there any question that Section 204 was intended to track Section 20a and to cover whatever Section 20a covered. See pp. 13-14, *supra*.

The Commission in *Pacific Power & Light Co., supra*, at 626, also relied upon the fact that a section of the originally proposed bill which would have required Commission certificates of public convenience and necessity for all new construction of facilities was deleted in Committee as not presently necessary, to support its restrictive view. It failed to note, however, that in the same Committee, S. Rep. No. 621, 74th Cong., 1st Sess. (1935), p. 20,

> The security section, now Section 204 [was] rewritten to obtain greater flexibility and workability than would have been possible under the original section.

In short, what Congress obviously had in mind was the elimination of the tremendous amount of paperwork which would have been required if the FPC were required to certificate *each* new electric facility, while still retaining control over controversial projects in the form of oversight over spending.

The Commission also relied, in *Pacific Power & Light*, on the fact that it did not have security issuance jurisdiction over all electric utilities. This fact is also irrelevant here. To be sure, the FPC does not control the proceeds of security issuances of utilities which have security issuances regulated by the SEC (where the utility is a holding company or a subsidiary thereof, see Section 318 of the Act) or by a State Commission (see Section 204(f)). But there is no question that State Commissions can, and do, examine the uses to which proceeds of security issuances will be put, as Commissioner Morgan

pointed out in dissent in *Pacific Power & Light, supra,* at 639-640, 1396. *Old Dominion Electric Cooperative,* 86 P.U.R.N.S. 129 (1950); *Lowell Gas Light Company* v. *Department of Public Utilities,* 319 Mass. 46, 64 N.E. 2d 640 (1946). Indeed, since the *Pacific Power & Light* decision of the FPC, at least one State Commission acting under a statute closely similar to Section 204 has, with court approval, specifically limited the uses to which proceeds of a security issuance could be put in resolving an issue as to unfair competitive conduct in the context of a security issuance proceeding. *Alabama Power Company* v. *Alabama Public Service Commission,* 278 Ala. 597, 179 So. 2d 725 (S. Ct. Ala. 1965). In each of these cases, the State Public Service Commission examined the uses to which the issue or its proceeds would be put, held hearings and made decisions on the consistency of the intended use with the public interest.[37] Thus the expressed fear of the FPC that electric companies regulated by it would be put at some sort of competitive disadvantage in raising funds seems to come down to a fear that the Commission might have to follow the admonition of its statute and give those parties affected by the financings of those companies subject to Section 204 the same protection that is given by the states to those affected by financings regulated by the states.

Moreover, it is the view of the Cities that the SEC can, and should, resolve similar issues in approving security issuances under Sections 6 and 7 of the Public Utility Holding Company Act of 1935, and that the court below, while recognizing a wide area over which the SEC must take cognizance of anticompetitive consequences, erred in allowing the SEC to avoid that responsibility in the particular circumstances

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[37]Contrary to the suggestion of Gulf States (brief, p. 15), it is clear that State Public Service Commissions do, in fact, consider the Federal Antitrust laws when determining where the public interest lies. *E.g., Northern California Power Agency v. PUC,* 96 Cal. 18, 486 Pac. 2d. 1218 (S. Ct. Calif., 1971).

obtaining below. This is especially true in view of the repeated efforts of both the SEC and the FPC to transfer the jurisdiction over the Holding Company Act from the SEC to the FPC. See, most recently, S 3866, 92nd Cong., 2d Sess. (1972); explanatory letter appearing in Congressional Record for August 1, 1972, at S 12419.

In short, under the statutory language of Section 204, the legislative history of that section, and the decisions of this Court, the FPC must examine and approve the purposes for which the proceeds of a financing will be expended before it can authorize the financing. It remains only to demonstrate that, in examining the purposes for which the proceeds will be expended, the FPC must take into account the antitrust laws of the Nation, their thrust and purpose.

III

THE FPC CANNOT APPROVE A FINANCING FOR A PURPOSE INCONSISTENT WITH THE ANTITRUST LAWS WITHOUT CONDITION

The requirement of Section 204 that the FPC address itself to and approve the purpose for which the money authorized may be spent means, as we have seen, that the Commission must investigate the object for which the money is to be spent, at least when complaint is made. The Commission's primary contention here seems to be that it need not bother with the "formalities" required of it by statute in approving financings, thus need not ever consider *any* of the purposes for which the proceeds are to be spent, and, therefore, need not consider the anticompetitive impact or purposes either. As we have shown, that argument is completely inconsistent with the statute, its legislative history and with the decisions of this Court.

Secondarily, however, the FPC appears to assert that it has jurisdiction to consider anticompetitive problems in every substantive section of Parts II and III of the Act save Section

204[38]. The Cities agree that the FPC has the power and duty to consider anticompetitive factors, when applicable, under Sections 202, 203, 205, 206, 207, 306, 307, and 305. We fail, however, to find any defensible rationale for the Commission's conclusion that it lacks this power under Section 204[39].

As we have seen, *supra*, pp. 17-27, the basis upon which *amicus* Public Service of Indiana and Gulf States would exclude the applicability of the antitrust laws to the electric industry are without merit.[40] This leaves only the remaining Commission argument which is based upon the inconvenience of complying with the statute, a matter with which we deal *infra*, p. 40, *et seq.*

While it is clear that the FPC has no authority to enforce the Sherman Act or to make dispositive findings as to the matters which would be involved in the direct enforcement of the antitrust laws, *McLean Trucking Co.* v. *United States*, 321 US 67, 79 (1944); *California* v. *FPC*, 369 US 482, 486, 488 (1962), it is also clear that the Commission cannot ignore the antitrust laws, their policy and scope. As this Court stated in an analogous case, *Southern Steamship Co.* v. *NLRB*, 316 US 31, 47 (1941):

> It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the . . . Act so single-mindedly that it may wholly ignore other and equally important Congressional

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[38]Sections 202, 203, 205, 206, 207, 306, 307 (FPC brief, pp. 14-15). As noted, *supra*, p.34, The Commission also takes anti-competitive factors into account in its supervision of interlocking directorates, the only remaining substantive section in Parts II and III of the Act, Section 305.

[39]We note that the Commission's order itself gave no such rationale, which may be one difficulty in its counsel's argument.

[40]Indeed, as this Court noted in *SEC v. New England Electric System*, 390 U.S. 207, 210 (1968), the Public Utility Act of 1935 was passed "to protect consumer interests through the 'elimination of "restraint of free and independent competition" '."

> objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

See also *Mansfield Journal Co. v. FCC,* 180 F 2d 28, 34 (D.C. Cir., 1950). And, as this Court pointed out in *FMC v. Svenska Amerika Linien,* 390 US 238, 245 Note 4, (1968), ". . . we have stressed that such an accommodation does not authorize the agency in question to ignore the antitrust laws." See also *McLean Trucking Co. v. United States,* 321 US 67, 79-80 (1944).[41] As the court below correctly pointed out, 454 F 2d at 948, there are "a host of decisions establishing that when an agency is called upon to determine whether a proposal or condition satisfies the 'public interest', or another similar broad standard, the agency has the authority and typically the responsibility to consider a challenge based on the asserted anticompetitive purpose or consequence of the proposal."

If there were any question as to the applicability of the policies of the antitrust laws to this sort of proceeding, however, they would be resolved by the holding of this Court in *Denver & Rio Grande, supra*. As this Court there held, in connection with the section of the Interstate Commerce Act after which Section 204 was modeled, *id*, at 492:

> We do not agree that Congress limited ICC consideration under § 20a to an inquiry into fiscal manipulation [footnote omitted]. Even if Congress' primary concern was to prevent such manipulation,

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41 As this Court pointed out in *California v. FPC,* 369 U.S. 482, 490 (1962), the purposes of the antitrust laws and of the regulatory statutes administered by the FPC are complementary, *i.e.,* to achieve the most efficient allocation of resources for the Nation. See also, *Northern Natural Gas Co. v. FPC,* 399 F 2d 953, 959 (D.C. Cir., 1968); *City of Pittsburgh v. FPC,* 237 F 2d 741, 754 (D.C. Cir., 1956); cf. *Marine Space Enclosures v. FMC,* 420 F 2d 577 (D.C. Cir., 1969).

> the broad terms "public interest" and "lawful object" negate the existence of a mandate to the ICC to close its eyes to facts indicating that the transaction may exceed limitations imposed by other relevant laws. Common sense and sound administrative policy point to the conclusion that such broad statutory standards require at least some degree of consideration of . . . anticompetitive consequences when suggested by the circumstances surrounding a particular transaction.

Thus, the Court held, at 498:

> We conclude, therefore, that the ICC is required, as a general rule, under its duty to determine that the proposed transaction is in the "public interest" and for a "lawful object", to consider the control and anticompetitive consequences before approving stock issuances under §20a(2).

IV

THERE IS NO OTHER JUSTIFICATION FOR IGNORING THE STATUTORY REQUIREMENT

The FPC (*e.g.*, brief, pp. 8-19) and Gulf States (brief, pp. 25-29) assert that the Cities should be remitted to some other, unspecified, avenue of relief, because it might be inconvenient for the Commission or Gulf States to resolve the issues involved here in a Section 204 proceeding.[42] The attorneys for the FPC go so far as to declare (brief, p. 14) that a Section 202 proceeding would provide "a direct and adequate

[42] It comes with something less than good grace for Gulf States, which through combination or conspiracy participated in blocking in its entirety the financing for LEC and its transmission for many years, to object, because there might be a slight delay in its financing, to the Cities' contention that the FPC should condition the financing authority on the cessation of illegality.

solution to Cities' need for transmission services". Unfortunately, there is no indication that such a statement was authorized by the Commission itself, and the Commission has held (albeit probably incorrectly) directly to the contrary. As we shall demonstrate, there is no satisfactory alternative avenue of relief open to the Cities.

As a matter of historic fact, there has long been a history of mistrust between the publicly owned systems and the private electric companies with the latter regarding the former as a natural enemy to be taken over, if possible, but in any event not to be assisted in any way. This tendency has been shown, most recently in the litigation before this Court, in *Gainesville Utilities Department v. Florida Power Corp.*, 402 U.S. 515 (1971) where Florida Power Corporation refused to enter into an inter-connection and pooling arrangement with a publicly owned system because, although that arrangement would benefit both parties, it would benefit Gainesville relatively more because of its isolated situation.[43] As a consequence of this mistrust, large electric companies have frequently been unwilling to interconnect with small or publicly owned electric systems.

Now that the *Gainesville* litigation is complete, the large electric companies frequently, as here, refuse to transmit power on reasonable terms for small or publicly owned electric systems or, similarly, refuse to offer coordination and other cooperation to publicly owned systems. Whether or not a small system could eventually obtain an agency order directing a large

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[43]Or as the president of one of the companies here put it in a report to his Board of Directors in June, 1969, in reporting on the joint efforts of the companies to halt the LEC program (pre-hearing exhibit B, FPC Docket No. E-7676), "Of course, construction will take from three to four years and, as you know, CLECO receives only approximately 4% of its gross revenue from all of the coops it serves and under the revised REA plan we will lose sales to only two of the coops with very little loss of profits–but it is the psychological and potential competitive position that we dislike."

company to furnish cooperation or services to it, the very fact that the agency process is, as this Court recognized in the *CATCO* case, *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 389 (1959); and in *FPC v. Hunt*, 376 U.S. 515, 527 (1964), "nigh interminable", especially when it involves intransigent parties who wish to delay agency action, virtually assures that a small system cannot prevail unless it is prepared to spend a very substantial sum of money and time to push its case and take or defend whatever appeals are necessary.[44] This is especially so when, as at present, the FPC staff is so depleted that virtually the entire case must be made by the small companies without staff help.

Thus it is frequently viewed by the large electric companies as being in their interest to refuse reasonable requests from small or publicly owned systems for service or cooperation and to litigate the small systems to death to ensure that they cannot obtain the desired order. When parties so disparate in size and resources come to grips without effective help from the FPC staff, it is unfortunately true that a proceeding which can be effectively delayed by the larger system will frequently deny the smaller system the justice it seeks.

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[44] As an example, one document made public as a result of the attempts by Gulf States to quash certain aspects of the Department of Justice CID, document No. 35, *Gulf States Utilities Co. v. Kauper*, M.D. La., Civil Action No. 71-102, demonstrates the determination of the companies to exhaust all substance from their small adversaries by prolonged litigation: "... if termination is dependent upon the Cities' success in the courts, it could run on for as much as fifteen years because Louisiana P&L plans to drag it through every court available to it." Documents from that proceeding, of which this Court may take judicial notice, will be referred to as "Document No. , *Gulf States v. Kauper*."

The Cities initially charged, and even the most limited discovery so far available has confirmed, the existence of a combination or conspiracy among the Companies to destroy LEC and the pool as potential competitors.[45] In the course of this combination or conspiracy the Companies refused to transmit power for LEC or the pool, while in combination bringing lawsuits and other forms of pressure to bear solely for the purpose of delaying the grant of the REA loan which would allow LEC to construct transmission line for its own use and for the pool. These lawsuits appear to have been jointly run by the so-called "legal committee" of the Companies[46] and, in some instances, to have been brought by the Companies' attorneys, but ostensibly on behalf of individual coop members who had been sought out and interviewed by the Companies for the purpose.[47] As the president of one of the Companies stated to his Board, shortly before the Companies decided to carry on their combination or conspiracy in restraint of trade through joint negotiations rather than by suit in the courts (after it became clear that any further suits would be thrown out peremptorily):

> Our efforts were not completely in vain as we delayed the project approximately 5 years and price escalation created problems in the cost of the project. In fact so much that the REA and Rural Electric Cooperatives have had to modify the plans as follows:

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[45]Document No. 1, *Gulf States v. Kauper,* shows that the top executives of each of the five privately owned electric companies in Louisiana met at ten o'clock A.M. on August 9, 1962, at the Capitol House Hotel "to discuss the recent formation of the Louisiana Electric Cooperative, Incorporated and to prepare a plan of action to oppose the $53,350,000 loan to this group by the REA for the purpose of constructing an electric generating station . . . and . . . transmission line within the State of Louisiana." That document further shows that the companies set up a detailed organizational structure through which they would coordinate their activities against the LEC.

[46]*E.g.*, Document No. 5, *Gulf States v. Kauper.*

[47]Documents 12 through 16, *Gulf States v. Kauper.*

(a) Same plant capacity - 200,000 kw.
(b) Service from the plant to four instead of eleven member cooperatives.
(c) 284 miles instead of 627 miles of 161 kv transmission lines.
(d) A reduction of the REA loan to the Louisiana cooperatives to $46,917,100.

Pre-hearing Exhibit B, FPC Docket E-7676.

Thereafter, although the Companies offered to negotiate with the REA on the basis that they would wheel power for the LEC generating plant to the load centers, thus obviating the need for LEC to build its own transmission lines, the Companies proceeded by prearrangement to negotiate on the basis of refusing to transmit power among the pool members or to coordinate with them in planning for growth to give the pool members the benefits of their LEC pool.

In short, by combination the Companies have forced the Cities, Dow and LEC to rely upon the transmission capacity of the companies, which they have adamantly refused to make available to the pool members.[48] Thus the intent of the Companies has been to block LEC construction of its generation for as long as possible, then when that was no longer feasible, to block any transmission not controlled by them and to block the LEC pool members from any access to the major cost advantages of power pooling.

The Cities came to the FPC (and the SEC) in an attempt to attain the prompt relief the administrative process was designed to afford to litigants. In both Commissions the Cities chose proceedings which 1) were of a nature such that the companies would wish to conclude them and therefore could not stall the administrative process excessively, and 2) had a direct nexus

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[48] A comprehensive study run by the Companies shows that their transmission network has more than adequate capacity for any transaction the pool members might engage in. See Document 405293; C 8253, obtained in discovery in Docket No. E-7676.

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with the complaints - i.e., the use of the monies authorized in the proceeding in the course of the conspiracy. In both Commissions the Cities were peremptorily denied relief with little (in the case of the SEC) or no (in the case of the FPC) explanation and with no alternative suggested.

The suggestion by the FPC attorneys in this Court that complete relief might be afforded in some other sort of proceeding is interesting, but apparently unauthorized. The FPC has twice held for example, that it has no power to order the transmission which the Cities and the pool require in a Section 202 proceeding. *City of Paris, Ky. v. Kentucky Utilities Co.,* 41 FPC 45 (1969); *Village of Elbow Lake, Minn. v. Otter Tail Power Co.,* 46 FPC ---- (Opinion No.603, September 13, 1971), *appeal pending, Otter Tail Power Co. v. FPC* (8th Cir. No. 72-1088). These decisions, it is true, turn on the question of whether the FPC can order a company to transmit for another, in vacuo, under Section 202, and not on the question here presented, whether the FPC could order a company *which already provides wheeling service for others* to cease its discriminatory refusal to provide the same sort of transmission service for the complainant under Section 205, which prohibits the granting of undue preferences to any person with respect to any service (such as transmission service) subject to the jurisdiction of the Commission, and also prohibits maintaining "any unreasonable difference in . . . service, facilities, or in any other respect . . .". See also Section 206. But it seems somewhat artless for the attorneys of the Commission to suggest, without more, in the light of the FPC cases to date, that a Section 202 proceeding will be a "direct and adequate solution to Cities' need for transmission service." (Brief, page 14).

The Commission, of course, whether or not it has the power to compel transmission under Section 202, has ample authority to condition its grants of authority, under Section 204 or otherwise, either upon the cessation of illegal practices or upon the transmission of power for others over

facilities of the applicant, when such transmission is not inconsistent with good operating practice, in order to cure for the future the illegal practices which have exited in the past. The Commission's conditioning authority under Sections 204 and 309, like that under the Natural Gas Act, is plenary. See, *e.g.*, *United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223 (1965); *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968); *Atlantic Refining Co. V. PSC of New York*, 360 U.S. 378 (1959); *Russell v. Farley*, 15 Otto 433, 26 L. Ed. 1060, 1063 (1882); *FPC v. Hunt*, 376 U.S. 515 (1964); *Texaco v. FPC*, 290 F 2d 149 (5th Cir., 1961); *Admiral - Merchants Motor Freight v. United States*, 321 F Supp. 353 (D. Colo., 1971) *affirmed*, 404 U.S. 802, rehearing denied 404 U.S. 987. Indeed, in comparable cases under Part I of the Act, the Commission has conditioned its authorization on the transmission of power for others. *Western Massachusetts Elec. Co.*, 39 FPC 723 (1968), affirmed, *Municipal Electric Association of Massachusetts v. FPC*, 414 F 2d 1206 (DC Cir. 1969); *FPC v. Idaho Power Co.*, 344 US 17 (1952).

The complaint proceeding, which the FPC initiated following the decision below on the basis of the Cities' Protest and Petition to Intervene in the second Gulf States financing proceeding, graphically demonstrates the ability of the Companies to stall when it is in their interest to do so. Quite aside from the fact that the FPC, on June 1, 1972, stayed all further proceedings in that case until after this Court has entered its decision in the instant proceeding, and confirmed that position on July 14, 1972, after vigorous objections from the Cities and Dow in their Petition for Rehearing, that case offers a textbook example of a situation where a plethora of voluminous outpourings by the Companies in the form of motions, objections, etc., all of which are eventually denied, have sufficiently clogged the machinery of justice as to bring the proceeding to a virtual halt. Judging from the proceedings so far, the Companies

hope to have the statute of limitations expire before they comply with basic discovery.

Moreover, the FPC has taken a financing case, where the Companies have the burden of proof, 5 U.S.C. 556(d), and by sleight of hand turned it into a proceeding where the Cities, which are injured by the actions of the proponents of the financing, are put to the burden of proof. The Commission itself, in its order of November 4, 1971, instituting Docket No. E-7676, stated:

> At such a hearing, the Cities, as proponents, shall have the burden of proving that such acts and practices of Gulf States Utilities Company are continuing, and to what extent the Commission has jurisdiction to remedy such acts and practices.

While the Cities have no objection to a proceeding like that established by the FPC, *if tied to a conditioning of the financing,* the present proceeding at the FPC offers little, if any, hope of an expeditious resolution of the problems which exist. When Gulf States refers to this proceeding (Brief, page 29, n. 61) as "a proper accommodation" of various policies, it is clear that it envisions years of litigation without relief, and the Cities fear just this result.

The suggestion by Gulf States (at Brief, page 28) that the Cities might bring a treble damage action (and cf. FPC brief, pp. 17, 8) is not responsive to the immediate needs of the Cities and their citizen consumers. While it is true that the Cities and their citizen consumers have been seriously injured financially by the conspiracy of the companies, the most pressing need is for transmission and pool cooperation, not damages. Moreover, the position of the FPC in the *Otter Tail* case before this Court - that having itself denied jurisdiction to give effective relief to Elbow Lake it will now attempt to ensure that Elbow Lake may obtain no relief elsewhere - makes the possibility of a treble damage suit even more costly and lengthy.

In short, the proceeding chosen by the Cities, in accordance with the statutory demand, is the only proceeding which is likely to lead to expeditious and effective relief. While the sort of proceeding now held in abeyance by the FPC might be appropriate, if the use of funds authorized were tied to the conclusions of that proceeding, thus furnishing some incentive for expedition to the Companies, that proceeding as it now stands, and the other proceedings suggested, are plainly unsatisfactory alternatives to the procedure established by Section 204.

CONCLUSION

For the above stated reasons, the Court should affirm the decision of the Court of Appeals, making clear the duty of the FPC to protect the public interest as directed by Congress in the passage of Parts II and III of the Federal Power Act.

Respectfully submitted,

George Spiegel

Robert C. McDiarmid

September, 1972